Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Notice of Proposed Rulemaking	)	CS Docket No. 02-52
	)	
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities	)	

COMMENTS OF KIMBERLY D. BOVA AND WILLAM L. BOVA, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SUBSCRIBERS SIMILARLY SITUATED

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INTRODUCTION

Kimberly D. Bova and William L. Bova (collectively the "Bovas"), individually and on behalf of all others subscribers similarly situated, by counsel, herein file their comments to the March 15, 2002 Notice of Proposed Rulemaking of the Federal Communications Commission ("Commission"). The Bovas are plaintiffs and class representatives in a class action lawsuit seeking recovery for unlawfully imposed franchise fees by a defendant cable modem service provider, Cox Communications, Inc. (and its subsidiary CoxCom, Inc.). In the underlying Notice of Inquiry, Cox Communications, Inc. requested that the Commission make a determination that cable modem service providers were not liable for franchise fees imposed due to the erroneous treatment by cable modem service providers and local franchise authorities.[1]

[1] See Letter from To-Quyen Truong, Dow, Lohnes & Albertson, Counsel to Cox, to Mr. William Caton, Acting Secretary, FCC (March 8, 2002), ex parte filing in *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Order Proceeding*, GN Docket No. 00-185 ("We also suggest Commission clarification that, even if it does not classify cable Internet service as a cable service, there is no basis for local authorities' imposition of additional regulatory obligations on the provision of that service, nor for franchise fee refund liability in light of past uncertainty

regarding the service's classification").

In the Notice of Proposed Rulemaking the Commission specifically noted that subscribers have raised the concern that franchise fees were unlawfully collected and were seeking a refund.[2] In response, the Notice of Proposed Rulemaking seeks comment (a) whether the Commission has jurisdiction by determining whether this issue implicates "a national policy concerning communications that calls upon Commission expertise"; and (b) whether it is appropriate for the Commission to exercise its jurisdiction to resolve the issue or whether this issue is more appropriately resolved by the courts. Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities Facilities, Notice of Proposed Rulemaking, 67 Fed. Reg. 18848, ¶ 24 (2002).

For the reasons set forth herein, the Bovas respectfully submit that the Commission does not have jurisdiction to lawfully sanction the imposition of a franchise fee beyond that authorized in Section 622 of the Cable Act. Moreover, the question of liability for franchise fees wrongfully imposed is not an issue of national policy concerning communications which calls upon Commission expertise. Instead, it is an issue of liability properly resolved by the Courts.

BACKGROUND - BRIEF SUMMARY OF STATURY AUTHORITY REGARDING FRANCHISE FEES

[2] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Order Proceeding*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 at paras. 106, fn. 353 (rel. March 15, 2002) (citing "Letter from David E. Mills, Dow, Lohnes & Albertson, Counsel to Cox, to W. Kenneth Ferree, Chief, Cable Services Bureau, FCC (Oct. 16, 2001), referring to pending litigation captioned *Bova v. Cox Communications, Inc.*, Civil Action No. 7:01 CV 00090 (W.D. VA.) (class action seeking recovery of franchise fees collected on cable modem service)").

Subscribers may not be charged a franchise fee for a service which is not a cable service. As part of the Cable Communications Policy Act of 1984, as amended in 1996, Congress limited local franchising authorities to charging cable operators franchise fees of no more than 5% of the cable operators' "gross revenues derived in such period from the operation of the cable system **to provide cable services**." 47 U.S.C. § 542(b) (emphasis added).[3] Cable operators are then authorized to assess customers the full amount of any lawfully imposed franchise fee for cable services which is treated by the cable operator as an "external cost." 47 U.S.C. § 542(c), (f), (g); 47 C.F.R. §§ 76.922(f)(ii), 76.933(e), 76.933(g)(5). This means that the monthly charge is set initially without the franchise fee, and then the fee is calculated separately from the monthly charge advertised and billed to customers. 47 C.F.R. § 76.922(a), § 76.922(f)(ii); Implementation of Sections of the Cable Television and Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, 9 FCC Rcd 1164, 1209 para. 87 (1993).

Since the 1996 amendments, millions of cable modem subscribers have been paying franchise fees related to gross revenue derived from non-cable services. In the case of the Bovas, they subscribed to Cox's cable modem service which was advertised to cost $34.95 per

[3] In addition to this explicit statutory language, the legislative history is equally clear that the franchise fee may not be imposed for non-cable services. See S. Conf. Rep. No. 104-230, at 180 (stating that "the franchise fee provision is not intended to reach revenues that a cable operator derives for providing new telecommunications services over its system"); H. Rep. No. 104-458 (adopting same language).

month, plus applicable taxes and fees. A separate 5% franchise fee was then assessed on top of the monthly charge for cable modem service. The franchise fee was itemized separately from the monthly charge on the Bova's bill, and Cox lumped this cable modem franchise together with the franchise fee imposed for cable television service.

Simply, no customer should have had to pay this additional franchise fee on top of the advertised cable modem service cost. Unlike DSL subscribers or dial-up subscribers, cable modem subscribers were paying an unnecessary 5% surcharge billed to them as if it was some sort of legally required tax. The Commission has now confirmed that cable modem service is not a cable service, and subscribers are entitled to the return of that unlawfully imposed fee. The largest cable modem service providers have uniformly taken the position that a franchise fee may not be imposed prospectively because cable modem service is an information service. While the Bovas would welcome a determination from the Commission confirming the obligation to return the unlawful franchise fees previously collected from customers, such a determination is best left to a court of law.

ARGUMENT

1. The Cable Act Authorizes Judicial Enforcement of any Franchise Fee Limitation

The Commission does not have jurisdiction over the issue of franchise fee liability as confirmed by the determination that cable modem service is not a cable service subject to a franchise fee. The fixed 5% franchise fee limitation, as originally adopted in the Cable Act, was designed to limit Commission jurisdiction. As the Commission has noted, the the Cable Act had divested it of authority to regulate cable franchise fees because FCC regulation had "considerable resulting controversy." Amendment of Parts 1, 63 and 76 of the Commission's

Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, Memorandum Opinion and Order, 104 F.C.C.2d 386, 393 ¶ 13 (1986) ("1986 Memorandum Opinion and Order").

In the 1986 Memorandum Opinion and Order, the Commission concluded that Congress intended enforcement of franchise fee provisions and adjudications of franchise fee disputes "would be administered in substantial part, through the jurisdiction of the courts." *Id.* Addressing a challenge to the Memorandum Opinion and Order, the D.C. Court of Appeals found that "the statute also appears to contemplate judicial enforcement of the franchise fee provision, as evidenced by the reference to 'court action' in section 622(d), 47 U.S.C. § 542(d)." *ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987), cert. denied, *Connecticut v. FCC*, 485 U.S. 959, 99 L. Ed. 2d 421, 108 S. Ct. 1220 (1988).

The Commission also acknowledged the superiority of judicial resolution of such disputes:

> Given the location of the fee limit in the Communications Act and our perception that Congress intended disputes over fees be judicially resolved, it appears to us that such jurisdiction as may remain in the agency was to be exercised at best concurrently with the judiciary. It is our opinion that judicial decision making in this area is both superior and preferred.

1986 Memorandum Opinion and Order at ¶ 16.

Finally, the D.C. Court of Appeals clearly outlined that basis for a cause of action for any violation of the franchise fee limitation created by the Cable Act, thus conferring jurisdiction in federal court:

> Section 622(d) provides that "in any court action under subsection (c), the franchising authority shall demonstrate that the rate structure reflects all costs of the franchise fees." This cross-reference to a "court action" arising under subsection (c) does not by its terms suggest that court actions are maintainable under other portions of § 622. It is possible to draw such an inference, however, from the fact that subsection (c) does not itself create an express cause of action.

> The cross-reference to a "court action" that is not explicitly authorized by the statute strongly suggests an assumption by Congress that courts would have jurisdiction to enforce § 622. Had Congress explicitly created a cause of action only under subsection (c), the inference would of course run in the opposite direction.

ACLU v. FCC, 823 F.2d at 1574, fn. 40.

Thus, courts are vested with jurisdiction over this dispute, and, as explained further below, are the superior venue for resolution of any dispute regarding liability.

II. The Commission Does Not Have Jurisdiction to Resolve the Issue of Operator Liability for Wrongfully Imposed Franchise Fees

As explained above, Congress intended federal courts to resolve a claim for illegally collected franchise fees. With the enactment of the Cable Act in 1984, the Commission retained limited jurisdiction to resolve "certain fee disputes that bear directly on our expertise in telecommunications, a very limited range of cases we believe." *1986 Memorandum and Order* at ¶ 17; Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 622(h)(2)(i), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2779, 2788; see also H.R. REP. NO. 934, 98th Cong., 2d Sess. 26, 64-65 (1984) (discussing FCC franchise fee regulations and congressional intent to strip FCC of its franchise fee authority). For matters not implicating such concerns the Commission quickly recognized that the Cable Act directs "parties to resort to courts to decide all other matters." *1986 Memorandum and Order* at ¶ 18.

The issue of liability for wrongfully imposed franchise fees satisfies neither of the conditions for Commission jurisdiction. Initially, while the issue of liability is national in scope in the sense that cable companies nationwide imposed a franchise fee in an attempt to secure local regulation, the issue of refund liability does not implicate national policy. Here, the issue

involved is not one of national policy as cable operators and subscribers both do not dispute dispute that the franchise fee may not he imposed for cable service. *cf. Time Warner Entertainment/Advance-Newhouse Partnership and the City of Orlando, Florida, Petitions for Declaratory Ruling on Franchise Fee Issues, Memorandum Opinion and Order*, 14 FCC Rcd 7678 (1999) (finding uncollected debts not counted as part of operator's gross revenues) (hereinafter "*Time Warner*"). Instead, cable operators are left defending that they are under no obligation to return the money improperly taken by raising issues of statutory construction or invoking defenses which they claim arise in common law.

Unlike the *Time Warner* decision, this dispute does not call for a national definition of gross revenue to provide guidance as to how to compute the maximum franchise fee. Aside from the financial liability, the only possible policy implication is that a finding of liability would deter cable operators in the future from causing customers to bear the expense of an erroneous regulatory classification. While cable companies will likely gloss over the lack of a national policy issue by appealing to the vague notion that this issue falls within the "national policy rubric" whatever that means, no policy implication can be defined.

Further, the second test is not satisfied as Commission expertise is not implicated in any way by this dispute. All issues related to the question of liability are purely legal issues best resolved in a court of law. For example, the defendant in the Bova's class action lawsuit has challenged the existence of a cause of action under Section 622 and has raised certain defenses (good faith, voluntary payment doctrine) requiring application of principles of federal and

common law.[4] While the Bovas argued those defenses are clearly not applicable, the Commission does not have expertise in the application of common law defenses such as the voluntary payment doctrine.[5] Likewise, to the extent that any defense requires the evaluation of evidence regarding defendants' motives, compelled discovery and fact-finding through an adversarial proceeding are proper.[6]

When balancing these competing interests, the Commission has previously recognized that, in the absence of a clear need for Commission expertise, court action is preferable:

> Given the location of the fee limit in the Communications Act and our perception that Congress intended disputes over fees be judicially resolved, it appears to us

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[4] In addition to being an invalid defense, a finding of good faith is likely inappropriate. From the inception of its offering, cable operators were certainly aware of the possibility that cable modem service is not a cable service subject to a franchise fee. The 1996 amendment to the Cable Act explicitly addressed treatment of non-cable services provided over a cable system. The Commission's DSL rulings should have likewise heightened awareness of the classification issue. *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 F.C.C.R. 24011 ¶ 40 (1998). However, in an effort to avoid classification as a telecommunications service subject to open access requirements, cable operators agreed to subject cable modem service to their existing cable television franchise agreements. The only expense associated with treatment as a cable service was the franchise fee, a cost cable operators knew would be borne by its customers.

[5] In the class action lawsuit, Cox claimed that the Eastern District case *MediaOne Group, Inc. v. County of Henrico*, 97 F.Supp. 712, 715 (2000) established their good faith because the Eastern District treated cable modem service as a "cable service." However, like the district court in *City of Portland*, the Eastern District was faced with both sides arguing that cable modem service was a cable service. MediaOne (and AT&T as buyer) supported treatment as a cable service to avoid common carrier open access requirements. The County of Henrico could only regulate the cable modem service if it was classified as a cable service. Like the Ninth Circuit, the Fourth Circuit refused to adopt the district court classification finding. *MediaOne Group, Inc. v. County of Henrico***,** 257 F.3d 356, 361 (4th Cir. Va. 2001) (noting that only Verizon argued telecommunications classification with neither MediaOne or Henrico County arguing anything but cable classification). In the face of the DSL classification decision by the Commission in 1998 and the *City of Portland* decision in 1999, and with the general inapplicability of the cable service classification, cable companies clearly should not have charged subscribers a franchise fee. Such discovery would take place in a court case.

[6] The Bovas are concerned that the Commission appears to have made some sort of preliminary finding in the Notice of Proposed Rulemaking that cable operators collected franchise fees in good faith. That issue was not before the Commission in its Notice of Inquiry, and on the cable operators would have made presentations on this issue. The Bovas are especially concerned that this finding was not based upon substantial discovery where cable operators were compelled to produce all written documentation relevant to their initial decisions to treat the cable modem service as a cable service and to impose a franchise fee. Likewise, the finding was not produced through an adversarial proceeding in which subscriber interests were represented on this issue and where cable operator witnesses were subject to cross-examination.

> that such jurisdiction as may remain in the agency was to be exercised at best concurrently with the judiciary. It is our opinion that judicial decision making in this area is both superior and preferred.

1986 Memorandum Opinion and Order at ¶ 16. Here, Commission expertise is not required to resolve the entitlement of cable modem subscribers to receive a return of fees they never should have had to pay in the first place.

III. The Commission May Not Retroactively Authorize Imposition of a Franchise Fee in Contravention of Federal Law

As set forth above, Section 622 clearly limits the franchise fee imposed to 5% of revenue derived from cable services. In addition, Section 622(i) provides that "[a]ny Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, *except as provided in this section*." 47 U.S.C. § 542(i). The Commission may not permit cable operators to impose a franchise fee in excess of 5% of revenue derived from cable services any may not permit cable operators to impose a franchise fee for non-cable services. Subscribers to cable television service and cable modem service such as the Bovas have been paying their cable operator a franchise fee of approximately 10% of all revenue derived from cable services.[7] The Commission may not, under any legal theory, retroactively authorize that charge as Section 622 authorizes no such action.

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[7] Conversely, the Commission has confirmed, in spite of its hands-off approach to franchise fee issues, overcharges of franchise fees are subject to enforceable refund rights:

> to the extent franchise fees are miscalculated, we believe that our approach fully protects subscribers' interests in paying reasonable rates because franchise fee increases are subject to refunds.

Thirteenth Order on Reconsideration, 60 Fed. Reg. 52106, 52110 (Oct. 5, 1995); *See also The City of Pasadena, California; The City of Nashville, Tennessee and The City of Virginia Beach, Virginia; Petitions for Declaratory Ruling on Franchise Fee Pass Through Issues*, 16 FCC Rcd 18192 (rel. Oct 4, 2001) (concurrence of Commissioners Martin and Abernathy) ("nothing in today's Order authorizes a cable operator to collect more

The House Report accompanying the Cable Act noted this limit on Commission authority. "The FCC is stripped of the authority to limit by regulation the level of this fee other than as provided in the bill, or to specify the manner in which the income from such fees may be spent." H.R. REP. NO. 934, 98th Cong., 2d Sess. 21, 26 (1984). Therefore, if the Commission attempts to retroactively waive the 5% limit franchise fee limit for cable services, the FCC is clearly exceeding its authority and violating the express terms and intent of the Cable Act.

Finally, the Commission noted in the Notice of Proposed Rulemaking that either cable operators or LFAs will lose out it plaintiffs are compensated for the illegal franchise fees. However, such a concern is both misguided and not appropriate under the law. Under the statutory scheme created by Congress, the LFAs were never entitled to the money in the first place. Cable operators or the LFAs could have petitioned the Commission for clarification or otherwise adopted a conservative posture instead of soaking plaintiffs with a 5% surcharge for which legal authority was not established.

Likewise, if a cable operator is unable to recover from the LFAs amounts refunded to customers, it only has itself to blame as it could easily have negotiated a contractual provision passing on any refund obligation to the LFAs. *See The City of Pasadena, California; The City of*

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money from subscribers as a franchise fee pass-through than the operator ultimately pays as a franchise fee to the LFAs. Thus, if a cable operator unintentionally over-collects from subscribers—due, for instance, to a mis-calculation or estimation of gross revenues—the cable operator must take some action to correct the discrepancy").

Nashville, Tennessee and The City of Virginia Beach, Virginia; Petitions for Declaratory Ruling on Franchise Fee Pass Through Issues, 16 FCC Rcd 18192 (rel. Oct 4, 2001) (in response to folding that advertising sales and home shopping commissions may be included in gross revenues for calculating franchise fees, FCC noted that LFAs and cable operators could negotiate how to treat franchise fee pass through in response to concerns regarding subscribers).

CONCLUSION

For the reasons set forth above, the Commission should decline to exercise jurisdiction regarding the issue of franchise fee liability.

Respectfully submitted,

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